Supreme Court, U.S.
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In the

Supreme Court of The United States

October Term, 1964

No. 624

SAMUEL A. PARSONS, LEROY E. LAWRENCE, ERMA PUFFER, AUSTIN T. FOSTER, LAWRENCE FRANKLIN, JOHN D. MASTERTON, RUSSELL HOLMES, STOYAN CHRISTOWE, CORNELIUS GRANAI and ROGER L. MacBRIDE,

Appellants

vs.

T. GARRY BUCKLEY, JANETTE N. BERRY and JAMES E. FITZPATRICK,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR APPELLANTS, SAMUEL A. PARSONS, ET AL

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OPINION BELOW

The opinion of the Three-Judge Federal District Court for the District of Vermont, 234 F. Supp. 2d 191 (1964), is set forth in the Record (R. 47). The Judgment of the Three-Judge Court is set forth in the Record (R. 108).

JURISDICTION

This action was instituted by the Appellees in the United States District Court for the District of Vermont wherein they alleged that the cause arose under the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C., §1983, 42 U.S.C., §1988, 28 U.S.C., §1343 and 28 U.S.C., §2201. Appellees claimed that they were denied the right of equal suffrage, equal protection of the laws and due process of law by virtue of the malapportionment of the bicameral General Assembly (legislature) of the State of Vermont.

The Court filed its opinion July 10, 1964 with the Clerk of the District Court for Vermont, wherein it decided that the apportionment of the Vermont General Assembly was in violation of the Fourteenth Amendment to the United States Constitution. The Judgment Order of the Court was filed August 3, 1964. Notice of Appeal was filed by Appellant MacBride August 29, 1964 and by the other Appellants September 2, 1964. The Appeal was entered and docketed with the Clerk of the Supreme Court of the United States October 26, 1964. Probable jurisdiction was noted by the Supreme Court of the United States December 14, 1964.

Jurisdiction to review a judgment of a Three-Judge District Court is conferred on this Court by 28 U.S.C. §1253.

CONSTITUTIONS AND STATUTES INVOLVED

ARTICLE XIV, United States Constitution

§ 1. Citizens; privileges and immunities; due process; equal protection

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTER II, Vermont Constitution

§ 13. **Town representation; vacancies**

SECTION 13. In order that the freeman of the state may enjoy the benefit of election as equally as may be, each inhabited town in this state may, forever hereafter, hold elections therein and choose each one representative to represent them in the House of Representatives. Provided, however, that the General Assembly shall have the power to regulate by law the mode of filling all vacancies in the House of Representatives which shall happen by death, resignation or otherwise.

CHAPTER II, Vermont Constitution

§ 18. **Senators; number; qualification; apportionment**

SECTION 18. The Senate shall be composed of thirty Senators, to be of the freemen of the county for which they are elected, respectively, who shall have attained the age of thirty years, and they shall be elected biennially by the freemen of each county respectively.

The Senators shall be apportioned to the several counties, according to the population, as ascertained by the census taken under the authority of Congress in the year 1910, regard being always had, in such apportionment, to the counties having the largest fraction, and each county being given at least one Senator. The Legislature shall make a new apportionment of the Senators to the several counties, after the taking of each census of the United States, or after a census taken for the purpose of such apportionment, under the authority of this State, always regarding the above provisions of this section.

CHAPTER II, Vermont Constitution

§ 38. **Term of senators and representatives**

SECTION 38. The term of office of Senators and Town Representatives shall be two years, commencing on the first Wednesday next after the first Monday of January following their election.

28 U.S.C., § 1343

§ 1343. **Civil rights and elective franchise**

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C., § 2201

§ 2201. **Creation of remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal

relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

42 U.S.C., § 1983

§ 1983. **Civil Action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C., § 1988

§ 1988. **Proceeding in vindication of civil rights**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Was it properly within the power of the District Court to limit the legislation to be proposed, considered and passed or rejected by the General Assembly of the State of Vermont scheduled to convene on January 6, 1965, to the devising of a constitutional method of reapportionment and redistricting or a revision of apportionment of both Houses of the General Assembly; or was this provision in the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

(2) Was it within the power of the District Court to decree that the terms of the members of the General Assembly scheduled to convene on January 6, 1965 shall expire on March 31, 1965; or was this provision of the Court's Order, Paragraph (3), an abuse of the equity powers of said Court?

STATEMENT OF THE CASE

By Plaintiffs' Amended Complaint filed April 23, 1963, Appellees, residents, voters and taxpayers of Vermont, prayed that a Three-Judge Court be appointed and that that Court enjoin the Governor of the State of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont and the County Clerks of the Counties of Vermont from engaging in any general election duties as granted them by the laws and the Constitution of the State of Vermont. Among other things, Appellees asked that the Three-Judge Court declare that Section 13 and Section 18 of Chapter II of the Constitution of the State of Vermont, relating to apportionment of the House and Senate be declared unconstitutional. A group of legislators were granted permission to intervene, as Defendant-Intervenors.

Hearing was held on the merits of the Plaintiffs' Amended Complaint on October 29-30, 1963, and on July 10, 1964, the Opinion of the Court containing its findings of fact and conclusions of law was filed. In that Opinion the Court asked that counsel for the parties prepare suggestions for decretal orders. At a hearing before the Three-Judge Court on July 22, 1964, at Brattleboro, Vermont, various suggestions were presented by counsel. On August 3, 1964, the three-judge

Court rendered its Judgment wherein it held that Sections 13 and 18 of Chapter II of the Constitution of the State of Vermont were unconstitutional. The Court further perpetually enjoined the Governor of Vermont, the Secretary of State of Vermont, the Town Clerks of the Towns of Vermont, the County Clerks of the Counties of Vermont, and their respective successors in office from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to the declared unconstitutional provisions of the Constitution of the State of Vermont. The Court did permit the election then in process to continue, but ordered that the legislators elected to take office January 6, 1965, (inadvertently referred to as January 11, 1965) were to consider only legislation limited to the devising of a constitutional method of reapportionment and redistricting. The Court further held that the terms of the members of both houses which would commence on January 6, 1965, would expire March 31, 1965, notwithstanding that the constitutional term of office is for each member two years.

Members of the General Assembly were elected November 3, 1964 and will take office January 6, 1965, the terms of the members of the 1963 General Assembly having terminated January 5, 1965.

SUMMARY OF ARGUMENT

Appellants submit that Paragraph 3 of the District Court's Order prohibiting usu[illegible] legislative enactments by the 1965 General Assembly, and [illegible]niting the terms of the 1965 Legislators to less than three months, is an abuse of discretion by the Trial Court. The Vermont legislature must be empowered to act during 1965 to consider and enact ordinary legislation, to appropriate and raise money for the operation of State Government after June 30, 1965, and to meet any emergencies that may arise in 1965 requiring legislative action. Vermont needs a minimum of one year's time from January 1, 1965 within which to reapportion its legislature and to elect a new legislature according to the mandate of the Supreme Court of the United States.

ARGUMENT

A. *The Three Judge District Court Abused Its Discretion in Limiting the Legislative Powers of the 1965 Vermont Legislature*

The only portion of the Court's Judgment Order of August 3, 1964, in issue in this appeal are the following lines from the last part of Paragraph (3) of the Order:

> It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 11, 1965 *provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965.* [Emphasis added.] (R. 110.)

Appellants concede as a general rule of law that the order of a Three Judge Court granting or denying injunctive relief will not be disturbed on appeal in the absence of a compelling indication that the Court abused its discretion. Appellants

submit that the Court did abuse its discretion in limiting the 1965 Legislature of Vermont to enacting legislation only relating to reapportioning itself.

The Vermont General Assembly meets biennially each odd numbered year. Its members are elected for a term of two years as provided by Chapter II, Sec. 38 of the Vermont Constitution. The Senate is composed of thirty Senators, apportioned to the fourteen counties, according to population, with each county entitled to at least one Senator.[1] The House of Representatives is composed of 246 Representatives with each town and city entitled to one representative.[2]

The House of Representatives of the Vermont General Assembly has always been apportioned according to the provisions of the Vermont Constitution. The Senate is presently apportioned, as interpreted by the Vermont Supreme Court, as provided by the Vermont Constitution.

Mikell v. *Rousseau*,
123 Vt. 139, 183 A. 2d 817 (1962).[3]

At the time of the Opinion of the Three Judge Court, August 3, 1964, the Vermont Legislature was not in session. It had held its regular session in 1963 and had held a special session in the early part of 1964. Since August 3, 1964, no further session of the legislature has been held.

Hence, the Vermont General Assembly has not had an opportunity to consider reapportionment since the Court's decision in this case or since the decision in *Reynolds* v. *Sims*, 377 U. S. 533, 12 L ed 2d 506 (1964) and the related opinions in the other reapportionment cases decided June 15, 1964.

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1. Vermont Constitution
   Chapter II, Sec. 18
2. Vermont Constitution
   Chapter II, Sec. 13
3. The Vermont Senate had been reapportioned regularly after each Federal census until the General Assembly failed to do so in 1951. As a result of the decision in *Mikell* v. *Rousseau*, the Vermont Senate was apportioned by the General Assembly according to the terms of the Vermont Constitution.

Appellants submit that a legislature even though malapportioned is still a legislature entitled to act as a legislature for a reasonable period of time. In his concurring opinion in *Baker* v. *Carr*, 369 U. S. 186, 7 L ed 2d 663, 705 (1962), Mr. Justice Douglas by footnote indicated:

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is none the less a legislature empowered to act (*Cedar Rapids* v. *Cox*, 252 Iowa 948, 964, 108 N. W. 2d 253, 262, 263; cf. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 SW 2d 40) is plainly correct."

Further, in the six reapportionment cases decided by this Court June 15, 1964, it was indicated there would be an interim period during which malapportioned legislatures would be permitted to continue to function as legislatures. In *Maryland Committee* v. *Tawes*, 377 U. S. 656, 675, 12 L ed 2d 595 (1964) this Court approved a two year period within which the Maryland legislature could be reapportioned. In *Davis* v. *Mann*, 377 U. S. 678, 692, 12 L ed 2d 609 (1964) a period of 1½ years within which to reapportion was approved.

As Mr. Justice Douglas stated in *Baker* v. *Carr*, p. 705 of 7 L ed 2d,

> "*** any relief accorded can be fashioned in the light of well-known principles of equity."

What is equitable for Vermont under the circumstances?

Appellants respectfully submit that Vermont should have at least one year from January 1, 1965 within which to reapportion and to elect a new legislature. In the meantime, the General Assembly should be permitted to function and carry out its ordinary functions as a legislature.

Equitable considerations require that the Vermont legislature be permitted to function with its usual powers during 1965. Plans for reapportionment are now being considered by a special legislative committee, by a special committee appointed by the Government and by other interested citizens in Vermont. Each plan provides for legislative districts in an attempt to comply with the decisions of this Court. Bills will be introduced early in the 1965 Session of the General

Assembly to reapportion. Yet, thorough consideration of the proposed bills will take a reasonable period of time. In the meantime, ordinary legislation will have to be enacted.

For example,

(1) Cities in Vermont receive power from the State through Charters enacted by the legislature. New city taxes or increase in city tax rates above that permitted by the Charter must receive the legislature's approval. Several cities require such changes now. Unless the City of Burlington can raise additional monies for its school system through new taxes or higher tax rates in 1965, its schools will suffer. An amendment to the Burlington City Charter by the Vermont General Assembly to provide the necessary tax revenue, should be enacted early in 1965. Other cities in Vermont have similar problems, relating to current income and school construction.

(2) The Vermont State Court System is in need of revision. A bill to enact proposed changes is ready for introduction in the Legislature.

(3) Money has been appropriated for the operation of State Government through June 30, 1965. Unless the General Assembly can consider an appropriation bill and can enact legislation to appropriate monies from July 1, 1965 for a reasonable period of time the State will have no money to pay its employees after June 30, 1965. It will have no money for welfare assistance, no money for State Police protection, no money for school aid to school districts, no money for school construction, no money for State officials and judges, no money for highway maintenance and construction, and no money to insure its property. There could be complete chaos in Vermont State Government after July 1, 1965, unless the Legislature can act in 1965.

(4) Further, additional legislation may be required to raise revenue for the operation of State Government, assuming an appropriation bill can be enacted.

(5) Also, the State needs a legislature to function to meet emergency needs of State Government as well as ordinary needs of State departments, which needs are real and should be met by new legislation although such needs should not be described as emergency needs.

However, in the event of emergency caused by war, or floods or other natural causes, it is essential that there be a legislature that would be empowered to act until a new apportionment can be enacted and a new legislature selected.

A reasonable time within which to consider reapportionment bills and passage would appear to Appellants to be six months, if the apportionment is done by the General Assembly. If done by a Constitutional Convention called by the Governor after enabling legislation of the General Assembly, the time schedule would be longer. Yet, it would seem such could be accomplished by either method so that a primary could be held and general elections held in late Fall of 1965 in order to have a new General Assembly available to serve commencing in January, 1966.

In *Reynolds* v. *Sims*, p. 8, *supra*, this Court stated:

> ". . . . . With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirement of the Court's Decree."

Here, the compelling equities are stronger than in the Reynolds case, in that the State of Vermont will have a legislature in power, but one that can not act to carry on ordinary legislative functions. The Court's Decree is an extreme embarrassment to the State and one that, we submit, is entirely unreasonable and inequitable.

B. *The Three Judge District Court Abused its Discretion in Limiting the Term of Office of the Members of the 1965 General Assembly*

By Paragraph 3 of the District Court's Decree the term of office of the members of the 1965 General Assembly ends March 31, 1965. The Court has in effect ruled that the legislature, which meets January 6, 1965, must organize itself, consider reapportionment bills and reapportion itself within a period of less than three months. Thereafter, a new legislature must be elected, presumably after a primary and general election; and thereafter will take office before June 30, 1965 to enact an appropriation bill and such additional tax

laws as may be necessary to raise the funds for the orderly operation of the State of Vermont government after June 30, 1965.

Appellants submit that this stringent time schedule is unreasonable and inequitable and is contrary to the intent of the decisions of this Court of June 15, 1964.

Further, since it is probable that a new legislature can not be elected and functioning as a legislature in Vermont by April 1, 1965, the State will be without a legislature empowered to act in emergencies after March 31, 1965. Appellants do not believe this Court intended by any of its reapportionment decisions to cause this result. The language of the Court in each decision suggests that reasonable time be permitted within which the legislature might heed the constitutional mandate to reapportion.

Maryland Committee v. *Tawes*, p. 9 *supra*.

Vermont, through its legislature, will reapportion within a timely period, if this Court permits it to do so.

The apportionment of each house of the General Assembly of Vermont will greatly affect all citizens of Vermont in many ways. The reapportionment must be the result of intelligent and mature thinking if the result is to be practical and non violative of the dictates of this Court and the Constitution of the United States. It is imperative that the 246 member House and the 30 member Senate not be hurried or forced into hasty action if justice and equity are to be components of the reapportionment plan finally adopted.

Here the relief granted by the District Court's Order was broader than the relief requested by the Appellees. (R. 108.)

Appellants submit the Court Order was in error and was an abuse of discretion by the District Court.

CONCLUSION

Appellants respectfully submit that the Three Judge District Court's Order should be reversed and that the Mandate instruct the Court to enter its order permitting the State of Vermont to (1) reapportion its legislature and elect a new General Assembly to take office on or before the first Wednesday after the first Monday in January, 1966;

(2) permit the 1965 General Assembly to remain in office and to enact all legislation necessary or desirable until its successor is elected and qualified to sit.

Respectfully submitted,

December 30, 1964

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